(7)

Supreme Court, U.S.
FILED
DEC 10 2001
CLERK

No. 00-1831

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

SANDRA L. CRAFT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the federal tax lien, which applies to "property and rights to property . . . belonging to" a delinquent taxpayer (26 U.S.C. § 6321), attaches to the indivisible and inalienable interests of that taxpayer in real property held in a tenancy by the entirety.

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STATEMENT

From 1866 to the present, Congress has authorized the National Government to place a lien on "property . . . belonging to" delinquent taxpayers. Throughout this period of time, the lower courts have held that the lien does not attach to tenancy-by-the-entirety real property when one spouse, but not the other, owes federal taxes and when state law treats the interests in the marital property as indivisible in nature. And in *United States v. Rodgers*, 461 U.S. 677 (1983), four Justices said that the lien statute would not cover an entireties case like this one (Blackmun, J., dissenting, joined by then-Justice Rehnquist, and Justices Stevens and O'Connor), and the five remaining Justices suggested the same but did not finally resolve the question. The Court should make clear today that the statute does not, and never did, reach such property.

Under Michigan law, as under the English common law that preceded it, property owned as a tenancy by the entirety is unique. It is not owned by one person, and it is not owned jointly by two or more persons. It is a fee unlike any other—one owned by, and the product of, a legal marriage. Whatever interest taxpayers thus have in the tenancy flows not from any individual right to the property but from rights that spring from the individual's status as a spouse of another. The property thus does not "belong[] to" one spouse or the other, but to the union between them.

Nor has this time-respected distinction been lost on Congress. In 1866, Congress enacted the law against the backdrop of a common-law tradition that for centuries had respected this view of entireties property and in a setting where the National Legislature itself had embraced (and still embraces) this view of entireties property in regulating the District of Columbia. Yet the legislature did not extend the statute to this unique tenancy, and positively precluded it by including the "belonging to" limitation. In 1916, Congress enacted the estate tax and specified that it applied to tenancies

by the entirety, but nonetheless chose not to extend the lien statute to such property. In 1954, in the immediate aftermath of two federal court of appeals decisions and two district court decisions concluding that the lien statute did not apply to entireties property, the House introduced a bill that would have defined "property" to include this tenancy. But the Senate rejected this "substantive" change in the law. Not surprisingly, in light of this history, every federal court of appeals to address the issue has refused to extend the tax lien statute to entireties property that under state law does not belong to either spouse.

At this late date, it thus is hardly accurate to claim that Michigan is using state-law property doctrines to exempt its citizens from an otherwise-applicable federal law. Quite to the contrary, it is the executive branch of the National Government that is attempting to extend an otherwise-inapplicable law to this taxpayer and in the process to invalidate a venerable Michigan property-law tradition. That change, if it ought to be made at all, should come from the legislature, not the courts.

A. History of the Tenancy by the Entirety.

1. The English Common Law.

Continuity and change, and continuity again, have marked the development of the law of tenancies by the entirety. Beginning in the fifteenth century, if not earlier, *see* 3 William Holdsworth, *History of English Law* 126, 526 (3d ed. 1923), the English common law recognized a unique variation on the joint tenancy. The joint tenancy, as most law students learn and some lawyers remember, represents a form of property ownership in which two or more tenants share the four "unities" of time, title, interest, and possession in a piece of property. What makes a tenancy in the entirety different is the existence of a fifth unity—a "unity of person" arising from a valid marriage. Because the English common law treated the husband and wife as one person, joint ownership was not

possible. Instead, the property was held in its entirety by the marital unit and not by undivided shares.

At common law, the tenancy in the entirety thus differed from the joint tenancy in several respects. First was the nature of the ownership interest. Borrowing from the French, the English common law described the ownership interest of the joint tenancy as seised "per my et per tout" (by the share and by all), and the ownership interest of the tenancy of the entirety as "seised per tout et non per my" (by all and not by the share). 2 William Blackstone, *Commentaries* 182 (R. Burns ed., 1786). While both tenancies involved undivided interests, the tenancy by the entirety constituted an *indivisible* interest and thus neither party had a share in the property. Second, since neither the husband nor the wife had a share in the property, it followed that they (unlike joint tenants) could not by themselves choose to alienate, encumber or partition their interest in the property. In the words of Blackstone's *Commentaries*: "Neither the husband nor the wife can dispose of any part without the assent of the other." *Id. See also* 4 James Kent, *Commentaries on American Law*, at 397-98 (Little, Brown 11th ed. 1866). Third, while both tenancies contained a right of survivorship, that right could be assigned in a joint tenancy but could not be assigned in a tenancy by the entirety. 2 Blackstone, *Commentaries*, at 185-86 (R. Burns ed.). *See also, e.g., Den ex dem. Motley v. Whitemore*, 19 N.C. (2 Dev. & Bat) 537, 1837 WL 495, at *2 (1837) ("This was settled, at least as far back as the reign of Edward the 3rd . . . . "). Lastly, private and governmental creditors traditionally could encumber joint-tenancy property when one tenant was in debt, while they could not do the same with respect to the indivisible interest of tenancy-by-the-entirety property. Roger A. Cunningham, William B. Stoebuck, Dale A. Whitman, *The Law of Property* § 5.5, pp. 215-16 (West 1984); *see United States v. Rodgers*, 461 U.S. 677, 702-03 n.31 (1983).

2. The American Experience.

As a general rule, the American colonies and the first States to the Union embraced these features of the tenancy by the entirety. Oval A. Phipps, *Tenancy by Entireties*, 25 Temp. L.Q. 24, 25 (1951); *Hunt v. Blackburn*, 128 U.S. 464, 469 (1888). "The destruction of joint tenancies," as one commentator noted, "does not apply to conveyances to husband and wife, which . . . are . . . conveyances to one person." 4 Kent, *Commentaries on American Law*, 397.

The American experience with the entireties doctrine, however, was not without innovation. While the tenancy was premised on aspirations that even the most cynical couple could embrace, it contained several untenable anachronisms. Not only was the tenancy a remnant of war-preoccupied feudal times, but it also carried with it some of the most one-sided features of early domestic law. At English common law, married women had few if any individual rights—to Blackstone, "the very being and existence of the woman is suspended," 2 Blackstone, *Commentaries* 430 (Clarendon Press 1765)—and so it could regrettably be said that "[t]he common-law idea of marriage is that the husband and wife become one person, and that person is principally the husband." Irving Browne, *Elements of the Law of Domestic Relations and of the Employer and Employment*, 14 (Boston Book Co. 2d ed. 1890).

It did not take long for nineteenth-century reformers to identify these inequities and for the gravitational forces of democracy to eliminate them. *See* Sarah M. Grimke, *Letters on the Equality of the Sexes and the Condition of Woman Addressed to Mary S. Parker* 74-83 (1838); *Women's Rights Petition to the New York Legislature, 1854* at ¶ 5. The ensuing adoption of the Married Women's Property Acts took root in the middle of the nineteenth century and ultimately confirmed the right of married women to own property in their own name and to retain property owned before the marriage.

Mississippi became the first State to pass the Act in 1839, and eventually all States and the District of Columbia did the same. John V. Orth, *Tenancy By The Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 BYU L. Rev. 35, 41 (1997).

Passage of the Acts eventually eliminated the universality of the entireties estate. Most western States, as a result of this legislative development, never adopted the doctrine. And as to the States that already had embraced the common-law principle, they took two different paths. Many of these States decided over time that the estate was incompatible with the individual rights of married women to own property, and that husband and wife essentially took such property as joint tenants. These States either eliminated the tenancy completely or effectively did so by defining the spousal interests as divisible, separate and reachable by creditors. *See* Orth, *supra*, at 41. In contrast, fourteen States along with the District of Columbia and the Virgin Islands preserved the tenancy as it existed at common law—but ensured over time that husband and wife shared equal interests in entireties property during their lifetimes and were equally disabled from alienating their interests without the consent of the other. *See* Appendix B (identifying different state laws).

3. The Michigan Experience.

Michigan took the latter path. There, "tenancies by the entireties enjoy an ancient and hoary tradition," *Rogers v. Rogers*, 136 Mich. App. 125, 134 (1984), *appeal denied* (Jan. 22, 1986), and they became part of the State's common law when Michigan entered the Union in 1837, *see Stout v. Keyes*, 2 Doug. 184, 1845 WL 3119, at *3 (Mich. 1845) (the courts "have been adjudicating common law actions upon common law rules and principles, since their organization under the state government").

Nineteenth century Michigan decisions described the tenancy this way:

> The interest William Beamer took with his wife was a peculiar one. It was an entirety. *Fisher v. Provin*, 25 Mich. 347 [(1872)]. They both took the same estate, the same interest, and it could not be separated. The right of the one was the right of the other. Neither could by a separate transfer affect the rights of the other or his own. What would defeat the interest of one would also defeat that of the other.

Vinton v. Beamer, 55 Mich. 559, 561 (1885). *See also Appeal of Lewis*, 85 Mich. 340, 341 (1891). Nor did passage of the Married Women's Property Act in Michigan in 1855 alter this view; it simply made clear that married women like married men could retain or buy property in their own name, but not that they had to do so. *See* 1855 Mich. Pub. Acts 168, § 1; *Fisher*, 25 Mich. at 351 (construing the Act).

Cases from the most recent century adhere to this view. "[I]t has been quite universally held that an estate by the entireties cannot be sold upon execution on a judgment rendered against either the husband or wife, because neither has any separate interest in such an estate." *Sanford v. Bertrau*, 204 Mich. 244, 248-49 (1918). Nor may one spouse encumber such property at the expense of the other:

> It is well settled under the law of this state that one tenant by the entirety has no interest separable from that of the other, has nothing to convey or mortgage or to which he alone can attach a lien. Neither can incumber real estate held as tenants by the entirety without the consent of the other. Each is vested with an entire title and, as against the one who attempts alone to convey or incumber such real estate, the other has an absolute title.

Long v. Earle, 277 Mich. 505, 517 (1936). *See also Nurmi v. Beardsley*, 275 Mich. 328, 330 (1936). The tenancy remained distinct in "form and substance" from the joint tenancy: The "unity" "of person" establishes that "a tenancy by the entirety 'is not a joint tenancy but is a sole tenancy.'" *Budwit v. Herr*,

339 Mich. 265, 272 (1954) (quoting 41 C.J.S., *Husband and Wife*, § 33(b), p. 457); *Muskegon Lumber & Fuel Co. v. Johnson*, 338 Mich. 655 (1954) (one spouse lacks "a determinable moiety in entirety property").

In 1975, the Michigan legislature reiterated that the Married Women's Property Act gave husbands and wives equal (albeit still indivisible) interests in entireties property. Mich. Comp. Laws § 557.71(1); 1975 Mich. Pub. Acts 288. After the legislation, it remained true that "[n]either the husband nor the wife has an individual, separate interest in entireties property, and neither has an interest in such property which may be conveyed, encumbered or alienated without the consent of the other." *Rogers*, 136 Mich. App. at 134-35. *See also Albro v. Allen*, 434 Mich. 271 (1990).

B. History of the Case.

Sandy and Don Craft were married in 1956 and bought a house in Michigan in 1972. Located in Grand Rapids, the house was the Crafts' sole residence and was purchased by them as tenants by the entirety. Pet. App. 2a.

Don became insolvent from April 1980 to August 1989, and failed to file any federal tax return for the tax years 1979 through 1986. Pet. App. 2a-3a. In July 1988, as a result, the IRS assessed him for unpaid taxes in the amount of $482,446.73. *Id.* at 45a. Don failed to pay the assessment, and in March 1989 the IRS filed a federal tax lien against all property and rights to property that belonged to him. *Id.*

In August 1989, Don and Sandy transferred ownership of their house to Sandy through a quitclaim deed. Pet. App. 74a. Three years later, in June 1992, Sandy sold the property to a third party for $119,888.20. *Id.* In accordance with an agreement between Sandy and the IRS, she kept half of the proceeds, and the other half was placed in an escrow account, subject to the same right, title, and interest that the federal tax lien had on the property. *Id.*

In April 1993, Sandy filed a complaint seeking to quiet title to the proceeds in the escrow account. Pet. App. 3a. In response, the IRS argued that Don had fraudulently conveyed the property to Sandy under Michigan law, and alternatively that it was entitled to half of the proceeds from the sale because its lien attached to Don's interest even though the property was owned as a tenancy by the entirety.

In its first decision in the case, the Sixth Circuit ruled for the Crafts. "[B]ecause Michigan law does not recognize one spouse's separate interest in an entireties estate," the court concluded that "a federal tax lien against one spouse cannot attach to property held by that spouse as an entireties estate." Pet. App. 55a. After determining that Don Craft had no assignable or separate interest in the house, the court remanded the case for a determination of "whether a fraudulent conveyance" had occurred. *Id.* at 57a.

On remand, the district court concluded that the 1989 transfer could not be characterized as fraudulent because Michigan courts have "consistently held that creditors have no right to complain" about a debtor's disposition of "entireties property because such property could not be reached to satisfy debts had it remained in the debtor's hands." Pet. App. 82a. *See Cross v. Commons*, 336 Mich. 665 (1953). At the same time, however, the trial court concluded that Don Craft's decision to make mortgage payments on the property while he was insolvent amounted to a fraudulent enhancement. *Id.* at 86a. The court therefore awarded the IRS the value of these property enhancements, totaling $6,693. *Id.* at 92a.

Both parties appealed to the Sixth Circuit. In addressing the IRS's appeal, the Sixth Circuit rejected the argument that Supreme Court precedent required the panel to revisit its decision in *Craft I*. Case by case, the panel decision (again authored by Judge Cole) refuted this interpretation of the Court's decisions. Pet. App. 18a-19a. In doing so, the court made clear "that state law determines the rights a taxpayer has

in property and federal law determines whether those rights constitute 'property' or 'rights to property' pursuant to section 6321." *Id.* at 15a n.13. And because Michigan law indicates that interests in entireties property are not individually transferable to third parties and cannot be unilaterally encumbered, the court held that they do not amount to attachable property under the federal tax-lien statute. *Id.* at 9a, 19a-20a. That was particularly true in this case, the court added, because the sole apparent interest the IRS attempted to attach—Don Craft's future interest in the home in the event his wife predeceased him—"never ripened into a present estate" as "Don predeceased Sandra" in August 1998. *Id.* at 18a n.15.

In addressing the cross-appeal, the court agreed that Don Craft had engaged in a fraudulent enhancement when he "used his own funds to enhance the property in order to avoid paying his tax debts." Pet. App. 29a. The IRS did not appeal the district court's decision that the 1989 transfer of the property to Sandy Craft was not a fraudulent conveyance.

SUMMARY OF ARGUMENT

The text, statutory context and history of the federal lien statute, together with the case law construing it, all support the decision of the Sixth Circuit.

I.A. In authorizing a federal lien on all "property and rights to property . . . belonging to" delinquent taxpayers, Congress did not allow the IRS to place a lien on the indivisible interest of a spouse in a tenancy by the entirety when one spouse, but not the other, owes federal taxes. Under Michigan law, which "determine[s] what rights the taxpayer has in the property," *Drye v. United States*, 528 U.S. 49, 58 (1999), "one tenant by the entirety has no interest separable from that of the other," and "has nothing to convey or mortgage or to which he alone can attach a lien." *Long*, 277 Mich. at 517. Because it constitutes an indivisible "sole tenancy," *Budwit*, 339 Mich. at

272, the entireties estate is not "property . . . belonging to" one taxpayer or the other.

B. The operative language of the statute dates from 1866, and the common-law background to it cements this conclusion. At that time, the courts consistently recognized that state laws creating liens in favor of private and public creditors did not attach to an indivisible entireties estate when just one spouse owed a personal debt. Section 6321's general reference to "property . . . belonging to" the taxpayer hardly suffices to "abrogate" this rule, *United States v. Texas*, 507 U.S. 529, 534 (1993)—not just because the common-law principle was so well accepted but also because Congress had adopted (and still adheres to) the doctrine in its capacity as the legislative sovereign over the District of Columbia.

C. Other federal statutes reenforce this interpretation. Far from standing alone in the Government's arsenal of tax-collection devices, § 6321 is one of three related statutes in this area. In addition to the lien statute, the Government may invoke (1) the administrative levy statute, which covers "property . . . belonging to" the taxpayer, and which does not require judicial involvement in order to seize relevant property, 26 U.S.C. § 6331, or (2) the foreclosure statute, which does require judicial involvement and notice to all related parties in order to obtain relevant property, 26 U.S.C. § 7403. Under the foreclosure statute, notably, the United States may go to court not only "to enforce the lien" under § 6321, but more expansively to "subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest" to payment of the tax. 26 U.S.C. § 7403(a). The markedly broader language of the foreclosure statute proves that the federal lien does not, as the Government argues (Br. 15), attach to any ineffable thing of "value," but only to historically-recognized property interests that could be attached by lien and that "belong[] to" the taxpayer. Add to this Congress's and the IRS's decision in other tax statutes and regulations to mention tenancies in the entirety by name when

they wish to regulate the unique interests created by them, and it becomes clear that the lien statute does not apply here.

D. Removing any doubt on this score is Congress's decision in 1954 to reject an amendment designed precisely to extend the lien statute to tenancies by the entirety. For the first 75 years or so after the legislature enacted the lien statute, the reported cases offer no indication that the IRS construed the law as applying to taxpayers like the Crafts. That policy apparently changed in the middle of the last century, because in 1951 and 1952 two federal courts of appeal rejected the IRS's effort to extend the lien statute to entireties property. Immediately after these decisions, the House proposed an amendment to the statute specifying that "property or rights to property" "includ[ed] the interest of such person as tenant by the entirety." Not only did the Senate defeat the amendment but the Congress ultimately re-enacted the lien statute without making any relevant changes to it. The timing of the proposal, the surrounding debates, and the decision to re-enact the law unaltered all provide evidence that Congress wished to preserve the lower courts' interpretation of the law.

II. The Court's cases interpreting the lien statute bolster this interpretation. They establish that state-law interests must have pecuniary value, must be independently controlled by the taxpayer, must be exchangeable and must be vested in order to be deemed "property or rights to property . . . belonging to" the taxpayer under federal law. Yet no such showing has been made here. And in applying these principles to joint-ownership interests, the Court has been careful to extend § 6321 and the other tax-collection statutes to joint tenancies only when the delinquent taxpayer, unlike here, has an independent right to alienate or encumber an interest in the property. Indeed, in one of those joint-ownership cases, *United States v. Rodgers*, 461 U.S. 677 (1983), four Justices said that the lien statute would not cover an entireties case like this one, (Blackmun, J., dissenting, joined by then-Justice Rehnquist, and Justices Stevens and O'Connor), and the five

other Justices suggested the same, though they did not finally resolve the question. Lastly, the sudden extension of this provision to entireties property would prompt a host of complex interpretive questions, which the legislature is much better equipped to address than the courts.

III. The Government's contrary arguments do not alter this conclusion. Its textual arguments do not account for—indeed, they omit any discussion of—the "belonging to" limitation in the text of the law, the common-law background to the statute, or the illuminating distinction between the lien and foreclosure statutes. Its discussion of the cases fails to appreciate the Court's careful distinction between joint-ownership settings in which the taxpayer has a separate interest in the property, and indivisible tenancies by the entirety in which no such interest exists. And its suggestions (Br. 25) that the tenancy by the entirety is a relic of a bygone era, that it turns on a mere "legal fiction," that it has lost its political charisma and that it leads to "irrationally disparate treatment of similarly situated taxpayers" cannot be reconciled with the Federal Government's recognition of the tenancy in the District of Columbia both before passage of this statute and ever since. Nor will Sandy Craft's interpretation lead to rampant tax-collection avoidance. The experience with this interpretation over the last 135 years offers no such lesson for the future. Congress's decision to create an unlimited marital deduction from the gift tax proves that property-shifting among spouses is hardly a vital concern—whether in the entireties setting or in the more pedestrian setting of simply putting title to property in the name of one spouse but not the other. And the ready availability of fraudulent-conveyance statutes demonstrates that the Government is more than amply equipped to meet any real risk in this area.

ARGUMENT

In challenging the Sixth Circuit's decision, the United States does not contest the court of appeals' interpretation of

Michigan law. It thus does not disagree with the lower court's description of the parameters of an entireties estate, the nature of the legal interests that arise under it, or the unity of person that characterizes such a tenancy—notably, that it "'is not a joint tenancy but is a sole tenancy.'" *Budwit*, 339 Mich. at 272 (quoting 41 C.J.S., *Husband and Wife*, § 33(b), p. 457). Sandy Craft, for her part, does not challenge the power of the National Government to enact a tax-lien statute that applies to entireties property. Nor does she question whether such a statute would preempt contrary state law.

All that the parties dispute is whether Congress meant to extend this ancient tax-collection tool to this ancient common-law setting and whether it enacted the necessary words to do so. As to that issue, the answer is straightforward: Whether one looks at the question from the vantage point of 1866 or at any time since, every indicator of statutory meaning confirms that Congress never wished to, and never did, break apart the marital unity of person that the common-law tenancy by the entirety brought together.

I. THE TEXT AND HISTORY OF SECTION 6321, TOGETHER WITH THE COMMON-LAW BACK-DROP THAT INFORMS IT, CONFIRM THAT THE LIEN STATUTE DOES NOT REACH ENTIRETIES PROPERTY.

A. By Its Terms, The Tax Lien Statute Does Not Extend To Entireties Property.

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. § 6321.

Enacted in 1866, the tax lien statute has remained materially the same ever since. Nineteenth century dictionary definitions confirm that "property" does not have the all-encompassing definition that the Government gives it and frequently was defined to cover only interests that were exclusively and personally one's own. *See* Alexander Burrill, *A Law Dictionary and Glossary* (2d ed. 1871) ("When things are fully our own, or when all others are excluded from meddling with them, or from interfering about them, it is plain that no person besides the proprietor, who has this exclusive right, can have any claim either to use them, or to hinder him from disposing of them as he pleases"); Giles Jacob, *The Law-Dictionary* (1st American ed. 1811) ("That which is proper or peculiar to one; that which belongs to one; that which is one's own; that to which one has an unrestricted and exclusive right, including all that is one's own, whether corporeal or incorporeal."), *id.* ("property is the highest right" one can have "to any thing . . ., which in no way depends on another man's courtesy").

Likewise, the definition of "lien" at that time concerned the *separate* property interest of the owner that could be attached, and as a result the creditor could take no more rights in the property than the debtor individually had. The lien thus was "commensurate only with the interest of the person through whom it arises," and consequently the government took the lien subject to all limitations on the taxpayer's rights in the property. Archibald Brown, *A Law Dictionary* (1875). *See also Fosdick v. Schall*, 99 U.S. 235, 251 (1878) ("it is well settled that the lien attaches subject to all the conditions with which it is incumbered when it comes into the hands of the mortgagor"); 51 Am. Jur. 2d *Liens* § 16; Boris I. Bittker, *Fundamentals of Federal Income Taxation* ¶ 39.7, p. 39-41 (Warren, Gorham & Lamont 1983) ("the government's rights can rise no higher than those of the taxpayer to whom the property belongs").

These definitions of "property" and "lien" do not naturally apply to a tenancy by the entirety when just one spouse owes a debt. In the first place, the essence of the tenancy is that it is indivisible and status-based. Neither individual personally owns the property, neither individual may encumber it, and accordingly there is no separate and personal interest to which the lien may attach. In the second place, since both spouses have equal indivisible interests in all of the property and since the government's "rights can rise no higher than those of the taxpayer," nothing productively could be attached. Everything covered by one spousal interest in the tenancy would be defeated by the other spousal interest.

The "belonging to" language in the statute reenforces these limitations, and indeed this phrase cuts to the heart of what is lienable and what is not. For all that belongs to each spouse is a present right to share use of the property with the other (so long as the marriage lasts) and a future right to receive the property in the event one spouse outlives the other (so long as the marriage lasts). The present right is not exchangeable—one does not buy a present right to enjoy the

landed interests of a spouse—and therefore is not attachable. And the future right, like the possibility of receiving the corpus of a trust if one lives sufficiently long, is too ephemeral and contingent to be attachable. The law has not generally permitted private or public creditors to place a lien on the hope (or fear) of outliving another. Until the future right vests in one individual or the other, such elusive prospects remain no more susceptible to a lien than they do to a levy or foreclosure. On top of that, even the most all-powerful and acquisitive creditor has never been permitted to step into the shoes of one spouse in the marital unit, whether to enjoy the present right to share the property or the future right to retain it upon the death of the other. In the context of a residence owned by the entireties, there is in short no cognizable or determinable property right to attach, and accordingly the words of the statute do not support this attempted exercise of federal power.

B. The General Terms Of The Lien Statute Did Not Alter, And Were Not Designed To Alter, The Common-Law Rule Against Placing Liens On Entireties Property.

When Congress enacted this law, it was well accepted that creditors could not place liens on real property owned by the entireties to satisfy the debt of one member of the marital unit. Because the Court does not lightly interpret legislation to alter such common-law principles, this history also defeats the Government's position.

"[W]here a common-law principle is well established . . . the courts may take it as [a] given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (internal quotation omitted). *See Cleveland v. United States*, 531 U.S. 12, 17 (2000). In applying this interpretive guide to 42 U.S.C. § 1983, which like the lien statute has a nineteenth-century pedigree, the Court has said that it is fair to assume

that the "members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981).

What is true of the 42d Congress that enacted § 1983 is true of the 39th Congress that enacted the tax-lien statute. In 1864 and 1865, as part of the revenue packages that included the Nation's first income tax, Congress enacted two short-lived predecessors to the current tax lien statute. The 1864 version, *see* 13 Stat. 223, 233, 38th Cong., 1st Sess., was not a lien statute at all; it provided for distraint of a delinquent taxpayer's income-generating property, nothing more. In 1865, *see* 13 Stat. 469, 470, 38th Cong., 2d Sess., Congress created a lien on "property or rights to property," and just a few months later the 39th Congress amended the statute to appear as follows:

> And if any person, bank, association, company, or corporation, liable to pay tax, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person, bank, association, company or corporation.

14 Stat. 98, 107, 39th Cong., 1st Sess. *See United States v. Estate of Romani*, 523 U.S. 517, 523 nn.5, 6 (1998); *Detroit Bank v. United States*, 317 U.S. 329, 334 (1943). In the intervening 135 years, Congress did not materially change the law. *See* Appendix A.

The common-law and statutory background to this legislation is instructive. Most if not all contemporaneous applications of private and public liens placed those liens on "property" or "real estate." *See, e.g., Ingraham v. Speed*, 30

Miss. 410, 1855 WL 3980, at *2 (Miss. Err. & App. 1855) (statute allowed "banks to take mortgages and other liens on property"); *Cook & Sargent v. Dillon*, 9 Iowa 407, 1859 WL 476 (1859) ("Our statute has made judgments in the Supreme or District Courts liens upon all interests in real estate, legal or equitable"); *Smith v. Ingles*, 2 Or. 43, 45 (1862) ("The statute . . . on this subject provides, in substance, 'that a judgment shall be a lien on real property of the judgment debtor . . . owned by him'"). *See also Mechanics Bank of Alexandria v. Seton*, 26 U.S. 299, 309 (1828) (where holder of stock was trustee and "never . . . the real owner," "no lien for [his] debt ever attached upon it"); *Grove v. Brein*, 49 U.S. (8 How.) 429 (1850) (lien cannot attach to seller's goods while in transit to buyer because title had already passed).

Yet, in the years before and shortly after 1866, the courts to our knowledge universally held that these statutory and common-law liens did not attach to traditional entireties property when just one spouse owed a personal debt. *See, e.g., Thomas v. DeBaum*, 14 N.J. Eq. 37, 1861 WL 3581, at *3 (N.J. Ch. 1861) ("The judgment, therefore, against the husband alone could not encumber or affect the joint estate of the husband and wife"); *Humberd v. Collings*, 20 Ind. App. 93 (1898) ("neither is the [entireties] estate liable for the debts of one of the tenants"); *Shinn v. Shinn*, 42 Kan. 1, 9 (1889) (lien invalid because where "the property is held in entirety by both the husband and wife there is no separate estate or interest in either which could be levied upon"); *Hemingway v. Scales*, 42 Miss. 1, 1868 WL 2219, at *11 (Err. & App. 1868) (disallowing sale of husband's estate to pay creditors because he could "not dispose of any part of the inheritance without his wife's concurrence"). Nor did it matter whether the creditor seeking the entireties property was a private or public one. *Town of Corinth v. Emery*, 63 Vt. 505 (1891) ("[t]he estate of the wife, and her husband's interest therein in her right, in the property in question, is protected from the husband's sole creditors"); *Morrison v. Seybold*, 92 Ind. 298, 1883 WL 5763,

at *4 (1883) ("the [entireties] land in controversy did not become liable for the payment of the taxes assessed upon the personal property of John S. Hart"); *Wallace v. Mestichelli*, 58 Pa. D. & C. 647, 648 (Pa. Comm. Pl. 1946) ("Admittedly, under the law of Pennsylvania a judgment against a husband does not become a lien upon property held by such husband and wife as tenants by the entireties. There is apparently nothing in any Federal law which would give the Federal Government greater rights than any ordinary judgment creditor to recover . . . taxes due."). *See also Humbert*, 20 Ind. App. 93 (assessment for gravel roads).

Under these historical circumstances, it strains credulity to assume that a body of lawmakers still captivated by Blackstone's *Commentaries* would preempt this common-law tradition through a general lien statute applicable to "property or rights to property." And still less is it possible to believe that they would do so at the same time that they added the "belonging to" limitation, which by its terms preserves rather than upsets this bedrock principle of the common law.

This principle of construction has special application here because not just the States, but the District of Columbia as well, embraced this doctrine. Recognizing that Congress has legislative control over the statutory and common law of the District, U.S. Const. art. 1 § 8, cl. 17; *Berman v. Parker*, 348 U.S. 26, 31 (1954), the Court has observed that "the policy of Congress" in regulating our country may be "shown by" the policy it embraces in regulating our national city, *Donnelley v. United States*, 276 U.S. 505, 517 (1928) ("And the policy of Congress [in a provision of the federal Prohibition Act] is further shown by the Prohibition Act for the District of Columbia"). *See also Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 512-19 (1989) (looking at pertinent D.C. Code in construing the Federal Rules of Evidence).

The "policy" of Congress in the District of Columbia has remained steadfast from the nineteenth century to the present.

Entireties property, the National Legislature has made clear, does not belong to either spouse and as a result cannot be attached to pay the debts of one spouse. *See Am. Wholesale Corp. v. Aronstein*, 10 F.2d 991, 992 (D.C. Cir. 1926) ("A judgment against the husband is not a lien on the [entireties] land, nor can his interest be sold under an execution."); *Alpher v. Preston (In re Estate of Wall)*, 440 F.2d 215, 218 (D.C. Cir. 1971) ("So it is with us today that the full complement of common law characteristics of cotenancy by the entireties is preserved[, including] a broad immunity from claims of separate creditors"). *See also Settle v. Settle*, 8 F.2d 911, 912 (D.C. Cir. 1925) ("[i]t cannot be disputed that this doctrine was imported into the early common law of the District"). While it is improbable that Congress would casually abrogate any well-accepted common-law principle, it is particularly improbable that it would do so when Congress had already adopted that principle for the District of Columbia.

C. Other Tax Statutes Indicate That Congress Did Not Extend The Lien Statute To Traditional Entireties Estates.

Because a statute is "known by the company it keeps," *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) (quotation omitted), the Court has frequently looked to related legislation to ascertain congressional meaning. In this instance, the foreclosure, estate and gift tax statutes all support this reading of the lien statute.

In addition to the lien statute, the Government has two other significant tax-collection devices—the administrative levy statute and the judicial foreclosure statute. The levy statute permits the Government to seize "property or rights to property . . . belonging to" the taxpayer by executive act and thus without judicial intervention. 26 U.S.C. § 6331. The foreclosure statute provides a mechanism for collecting taxes that is both narrower and broader than the levy statute. It is narrower because the statute requires the filing of a civil

action and notice to all parties with an interest in the property. But it is broader because it allows the Government either "to enforce the lien" under § 6321 or "to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability." 26 U.S.C. § 7403(a). The markedly-broader coverage of property interests susceptible to foreclosure demonstrates that the lien statute was not designed to cover all conceivable interests in property. Otherwise, the drafters of § 7403(a) would not have believed it necessary to specify a second foreclosure option and would not have believed it necessary to establish that this second option went beyond "property . . . belonging to" the taxpayer to "any right, title, or interest" of the taxpayer. While it seems unlikely that the foreclosure statute itself reaches entireties property in view of the unique definition of that property interest, there can be little doubt that it covers more property interests than the lien statute. This, too, defeats the Government's all-encompassing interpretation of § 6321.

Congress's treatment of the estate and gift taxes leads to a similar conclusion. In 1916, three years after ratification of the Sixteenth Amendment, Congress enacted an estate tax. In doing so, the legislature specified not only that the tax would apply to entireties property but also explained how that application would work. Under § 202 of the Act, "the value of the gross estate of the decedent" was to "be determined by including the value at the time of his [or her] death of all property, real or personal, tangible or intangible, wherever situated." 39 Stat. at 777, 64th Cong., 1st Sess. Then § 202(c) specified that the value of the estate would include "the extent of the interest therein held jointly or as tenants by the entirety." *Id.* at 778. As the Court commented in *Tyler v. United States*, 281 U.S. 497, 501 (1930), in assessing the constitutionality of the provision, "[t]he applicable provision of § 202(c) is explicit, and the intent of Congress thereby to impose the challenged tax is not open to doubt." Without this

language, *Tyler* indicated, the "inclusion of [entireties] property" "probably could not be justified by the terms of the statute." *Id.* at 501-502.

The gift tax follows this pattern. As enacted in 1932, the gift tax applied to "the transfer . . . of property by gift . . . whether the property is real or personal, tangible or intangible." 47 Stat. 245, 72nd Cong., 1st Sess., § 501 (1932). Immediately thereafter (and in notable contrast to the lien statute), the IRS promulgated a regulation specifying that the tax applied to the creation or termination of entireties property where one spouse provided most or all of the consideration. Treas. Reg. § 79 (1933); *see* 47 Stat. 245, *supra*, § 530. Then, in 1954, Congress changed the rule, making clear that the tax did not apply to the creation of entireties property as between spouses, *see* 26 U.S.C. § 2515 (1954) (real property) and § 2515A (1976) (personal property)—a position that the legislature maintained until it enacted the unlimited marital deduction for gifts. Pub. L. 97-34, 95 Stat. 172, § 403(c)(3)(B), 97th Cong., 1st Sess. (1981). The Federal Government's explicit regulation of entireties property in the estate and gift tax settings provides further evidence that the conspicuously-silent lien statute does not cover this tenancy.

D. In 1954, Congress Rejected An Amendment Designed To Extend The Lien Statute To Entireties Property.

The history of § 6321 completes this interpretive picture. For three quarters of a century after passage of the lien law, it appears that the Government did not try to attach entireties property. No federal cases are reported revealing any such effort, and it would seem that the Government had the same expectations about the scope of the general lien law that private and state creditors had about comparable state lien laws—that they did not attach to traditional entireties property when just one spouse owed taxes.

That policy appeared to change when the Government pursued two lien claims in Michigan. In 1939, in *Shaw v. United States*, 94 F. Supp. 245 (W.D. Mich.), the Government argued that the lien attached to a husband's interest in entireties property. But the district court disagreed, noting that "the Supreme Court of Michigan has consistently aligned itself with what appears to be the majority rule to the effect that no portion of an estate by the entireties may be subjected to a lien for the individual indebtedness of either spouse." *Id.* at 246. "This immunity," the court added, "is not an exemption but arises from the peculiar nature of the estate" under Michigan law. *Id.* Six years later, in *United States v. Nathanson*, 60 F. Supp. 193 (E.D. Mich. 1945), the Government made the same claim and met the same fate. Observing that the Government could not show any cases "for its position that creditors [of one spouse] can successfully levy on the rents from an estate by the entirety," *id.* at 194, the court concluded that a lien could not "be imposed upon property held by the entirety for taxes due from the husband alone." *Id.*

This pattern soon repeated itself at the courts of appeal. In 1951, in *United States v. Hutcherson*, 188 F.2d 326 (8th Cir.), the court held that the federal tax lien statute did not extend to tenancies property, concluding that "[t]he characteristic of immunity from the individual debt of either spouse must, under the Missouri law, exist or the estate is not one by the entirety." *Id.* at 330. One year after that, the Third Circuit reached a similar result in *Raffaele v. Granger*, 196 F.2d 620 (3d Cir. 1952).

Hutcherson, Raffaele and the Michigan district court cases did not go unnoticed. In 1953, as Congress was preparing its comprehensive overhaul of the Internal Revenue Code, the legislature received a suggestion: "[T]he law should be changed," the Joint Committee on Taxation was told, "to overcome the effect of court decisions holding that the Commissioner cannot levy on the whole or any part of

property held by husband and wife as tenants by the entirety to satisfy the tax debts of one of the spouses." Staff of J. Comm. on Internal Revenue Taxation, 83d Cong., 2d Sess. Preliminary Digest of Suggestions for Internal Revenue Revision Submitted to the J. Comm. on Internal Revenue Taxation (J. Comm. Print 1953). The House agreed and proposed adding the following phrase to the tax lien statute immediately after the words "property and rights to property"—"(including the interest of such person as tenant by the entirety)." *See* H.R. Rep. No. 83-2543 (1954). In the view of the House, this represented "[a]n important change" to existing law and it was designed only to "impose a lien upon the right of survivorship of the tenant by the entirety." *See* Staff of J. Comm. on Internal Revenue Taxation, 83d Cong., Material Proposed to be Included in Ways and Means Comm. Print, binder 54, at 2. *See also* H.R. 8300 Rep. No. 1337 (1954).

The amendment did not fare well in the Senate. The President of the Florida Title Association wrote to explain that the proposal "does not provide to what extent the claim of lien would exist nor how it is to be enforced and how it may be released," and that "it would vitally affect the method of title evidencing" in entireties States. *See* Hearings Before the Comm. on Finance of the United States Senate, H.R. 8300, 83rd Congress, Part 4 (1954). The Senate Finance Committee took up the matter and eventually rejected this change in the law. It indicated, through a press release no less, that the House's definitional modification would have made a "substantive change" in the law and would *not* simply "continue" the "present law" in "effect." Senate Finance Comm., 83d Cong., Press Release No. 4 on H.R. 8300 (Comm. Print 1954). At the end of the day, Congress thus opted to "continue the existing law" under the tax-lien statute, Report of the Senate Comm. on Finance, H.R. 8300, 83d Cong. (1954), as that law was reflected in the recently-decided lower-court decisions. *See also* Summary of Finance

Committee Amendments to H.R. 8300 ("restor[ing] present law by deleting" House amendment).

It takes little historical imagination to draw the common-sense conclusion that the 1954 House amendment was designed specifically to change the lien statute as it had been interpreted by the lower courts prior to the proposal. And the Senate's rejection of that effort confirms that this interpretation of the law was meant to remain unchanged—particularly since the Congress as a whole in 1954 ultimately re-enacted the very language of the statute that the lower courts had held did not cover traditional entireties property. "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. 16, 23-24 (1983). That same inference applies here—particularly in light of the pre-amendment history of lower court decisions and the 1954 re-enactment of the original language of the law. *Compare Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-382 (1982) (when Congress "left intact the statutory provisions under which the federal courts had implied a cause of action," inaction was itself evidence that Congress affirmatively intended to preserve that remedy), *and Keene Corp. v. United States*, 508 U.S. 200, 212-13 (1993) (when Congress re-enacts statutory language that has been given a consistent judicial construction, the Court adheres to that interpretation in construing the reenacted law), *with Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994) (refusing to rely on congressional inaction that was susceptible to multiple interpretations).

Any doubt about this point is laid to rest by the post-1954 history of the statute. After the failed effort to amend the provision in 1954, the lower courts continued to respect state laws treating entireties property as indivisible in nature and as belonging to the marital unit rather than to either individual.

See, e.g., United States v. Am. Nat'l Bank of Jacksonville, 255 F.2d 504 (5th Cir.), *cert. denied*, 358 U.S. 835 (1958); *Benson v. United States*, 442 F.2d 1221 (D.C. Cir. 1971); *Cole v. Cardoza*, 441 F.2d 1337 (6th Cir. 1971); *Internal Revenue Serv. v. Gaster*, 42 F.3d 787 (3d Cir. 1994); *United States v. Davenport*, 106 F.3d 1333 (7th Cir. 1997) (*dictum*). *See also Pitts v. United States*, 946 F.2d 1569 (4th Cir. 1991). And while Congress debated the appropriate treatment of entireties property, it did not extend the lien statute to such interests. *See, e.g.*, J. Comm. on Taxation, 107th Cong., 1st Sess. (2001). Nor did Congress do so when it enacted The Federal Tax Lien Act of 1966, Pub.L. 89-719, 80 Stat. 1125, which made significant changes to other components of the federal lien laws.

II. THE COURT'S CASES CONFIRM THIS INTERPRETATION.

A. State-Law Property Interests Must Be Exchangeable, Divisible And Vested To Be Covered By The Federal Lien Statute.

The tax lien statute, the Court repeatedly has made clear, does not itself "'create[]'" "'property rights but merely attaches consequences, federally defined, to rights created under state law.'" *United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 722 (1985) (quoting *United States v. Bess*, 357 U.S. 51, 55 (1958)). As the Court summarized the point most recently: "We look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify." *Drye*, 528 U.S. at 58.

In ascertaining what "state-delineated rights" fall "within the compass" of the federal statute, *Drye*, 528 U.S. at 58, the Court has been careful to say that the law does not cover just any ephemeral interest of "value." Not only must the right be of some value under state law, but it also must contain other,

more concrete qualities. The value must be quantifiable or "pecuniary" in nature. *Id.* at 60 n.7. The taxpayer's interest must have "ripen[ed] into a present estate." *Id.* The taxpayer must have the "unqualified right" to "exercise[] dominion over the property." *Id.* at 60-61. And the taxpayer must have the right "to channel that value to" another, *id.* at 61—which is to say the interest must have "'an exchangeable value,'" *id.* at 56 (quoting *Jewett v. Commissioner*, 455 U.S. 305, 309 (1982)), and must be a non-personal interest that others (besides the taxpayer) may equivalently enjoy, *see Rodgers*, 461 U.S. at 691 n.16 (quoting Bittker, *Federal Taxation of Income, Estates, and Gifts* ¶ 111.5.4, at 111-102) (1981) ("'the tax collector not only steps into the taxpayer's shoes but must go barefoot if the shoes wear out'"). *See Rodgers*, 461 U.S. at 690-91 (the "Government's lien under § 6321 cannot extend beyond the property interests held by the delinquent taxpayer").

In applying these principles, the Court's actions have matched its words. In *Bess*, for example, the Court held that a taxpayer's present right under a life insurance policy to obtain the cash surrender value of the policy was "property . . . belonging to" the taxpayer. *United States v. Bess*, 357 U.S. 51, 55-56 (1958). But, at the same time, it held that the lien could not attach to the future proceeds of a life insurance policy. "It would be anomalous," the Court held, "to view as 'property' subject to lien proceeds never within the insured's reach to enjoy." *Id.* at 55-56. And in *Drye*, the Court applied the statute to a vested inheritance that the heir had a right under state law to disclaim within nine months of the decedent's death. In doing so, the Court noted that "Arkansas law primarily gave Drye a right of considerable value—the right either to inherit or to channel the inheritance" to an independent party, which "simply cannot be written off as a mere 'personal right.'" 528 U.S. at 60.

The Court has adhered to these principles in the context of joint tenancies and other types of joint ownership interests. In

United States v. National Bank of Commerce, the Court determined that the administrative levy statute applies to all money in a joint bank account, in which the debtor "had the absolute right under state law and under his contract with the bank to compel the payment of the outstanding balances in the two accounts." 472 U.S. at 724. Not only did state law specifically give the taxpayer an independent and separate right to withdraw all of the money in the account, but the IRS (unlike here) had promulgated a regulation that specifically allowed such a levy. *Id.* at 721. And in *United States v. Rodgers*, 461 U.S. 677 (1983), the Court ruled similarly in the context of the foreclosure statute. In extending the statute to a homestead estate, "[i]t bears emphasis," the Court pointed out, "that the rights accorded by the homestead laws vest independently in each spouse" and that each spouse has a "separate" right in the property. 461 U.S. at 685.

B. An Interest In A Tenancy By The Entirety Does Not Satisfy This Test.

Measured against these requirements, the Government's claim clearly fails. Under Michigan law, "one tenant by the entirety has no interest separable from that of the other," and "has nothing to convey or mortgage or to which he alone can attach a lien." *Long*, 277 Mich. at 517. "Husband and wife take the estate as one person," "they take but one estate," *Nurmi*, 275 Mich. at 330, and "neither has any separate interest in such an estate," *Sanford*, 204 Mich. at 248-49.

Each of these features of the tenancy predated enactment of the federal tax lien statute, each has withstood the vicissitudes of time, and each precludes the Government from imposing a lien on the Crafts' house. By any definition of the estate under Michigan law, the house simply was not "property or rights to property . . . belonging" to Don Craft. He could not independently exchange his interest in the property. And any future right to exercise complete control or dominion of the property had not yet vested and clearly was

not exchangeable. *Drye*, 528 U.S. at 60 n.7. Nor was his spousal interest in using the property one that others—whether private or public creditors—could enjoy. A status-related property interest is by definition neither exchangeable nor attachable. After all, it is one thing to step into the shoes of a debtor; it is quite another to assume the role of a spouse in doing so.

C. *Rodgers* Goes A Long Way To Resolving This Dispute.

In *Rodgers*, four Justices reached this same conclusion, and the remaining five Justices left the question open but adopted an analysis that goes a long way to rejecting the Government's argument. The decision therefore deserves extended treatment.

At stake in *Rodgers* was the judicial-foreclosure statute, 26 U.S.C. § 7403, which as noted authorizes the federal government to go to court to force a judicial sale (1) of property on which a federal lien has been placed or (2) of any other property in which the delinquent taxpayer may have an interest. The question for the Court was whether the foreclosure statute authorized the Government to compel a judicial sale of homestead property owned by a husband and wife when just one spouse owed taxes. In concluding that it could, the majority first distinguished § 7403 on the one hand from § 6331 (the levy statute) and § 6321 (the lien statute) on the other. It acknowledged that "the Government's lien . . . cannot extend beyond" the property rights "held by the delinquent taxpayer." 461 U.S. at 690-91. But it then reasoned that "[s]ection 7403(a) provides, not only that the Government may 'enforce its lien,' but also that it may seek to 'subject *any property*, of whatever nature, of the delinquent, or *in which he has any right, title, or interest*, to the payment of such tax or liability.'" *Id.* at 692 (quoting 26 U.S.C. § 7403(a)). The power to go beyond enforcing its lien together with the requirement that all interested persons be

made parties to the judicial proceeding, the Court concluded, showed that Congress contemplated "not merely the sale of the delinquent taxpayer's own interest, but the sale of the entire property." *Id.* at 694. In reaching this conclusion, the majority relied on "the historical background against which the predecessor statute to § 7403 was enacted." *Id.* at 694.

In the course of its analysis, the majority also responded to the dissent's reliance on the 1954 House proposal designed to specify that the tax lien statute covered tenancy-by-the-entirety property. It first noted that the "amendments at issue" bore "only the most tangential relationship" to the case because they "did not concern § 7403." *Id.* at 702 n.31. It then added that "tenancies by the entirety pose a problem quite distinct from that at issue in the case of homestead rights": With entireties property, "no tax lien could attach in the first place because neither spouse possessed an independent interest in the property"; "[i]n the homestead context, by contrast, there is no doubt, even under state law, that not only do *both* spouses (rather than neither) have an independent interest in the homestead property, but that a federal tax lien can at least *attach* to each of those interests." *Id.*

The *Rodgers* majority thus wholeheartedly embraced two reasons for adopting Sandy Craft's position—namely, that the language of the foreclosure statute is conspicuously broader than the language of the lien and levy statutes, and that the meaning of the tax-collection laws are informed by the common-law background surrounding their passage. And the majority halfheartedly embraced a third, more dispositive reason for adopting Mrs. Craft's position—namely, that even if the lien statute covers general homestead rights it does not cover tenancies by the entirety.

The four members of the *Rodgers* dissent (Blackmun, J., writing for then-Justice Rehnquist and Justices Stevens and O'Connor) embraced Sandy Craft's position far more directly. As to the interpretation of the foreclosure law, the dissent

agreed that Congress gave the National Government "greater power" under the foreclosure law than it did under the "more restrictive language" of the lien/levy statutes, *id.* at 726, but believed that "the debtor's default does not vest in the lienholder rights that were not available to the debtor himself." *Id.* at 714. In reaching this conclusion, the dissent made clear how the issue should be resolved for entireties property. It noted that entireties property represented the easier case, as "[i]t is true, of course, that tenancies by the entirety were held to be immune from federal tax sales on a theory different from that applied to homestead property like Mrs. Rodgers"—that neither spouse, unlike homesteaders, owned a share in the property. *Id.* at 720. And given "the absence of any evidence of congressional intent to the contrary," Congress's "deliberate choice to leave undisturbed the bar to tax enforcement created by a tenancy by the entirety" suggests that it did not mean to alter this common-law rule when the statute was first enacted. *Id.* Lastly, it concluded that the 1954 proposed amendments showed that the Senate "foiled an attempt by the House to extend the reach of federal tax liens to tenancies by the entirety." *Id.* at 719. For at the time, it observed, "existing law" "unequivocally" rejected the application of the federal tax collection laws to entireties property. *Id.* at 720 at n.11.

All things considered, the Court's precedents favor Sandy Craft. Not only do they carefully preserve the distinction between joint tenancies and entireties tenancies, but they also indicate that the eligible "property . . . belonging to" a taxpayer to which the lien may attach must be property that can be independently exchanged and that is not merely personal to the taxpayer. That test simply does not reach the Crafts' "sole" tenancy in their house.

III. AN EXPANSION OF THIS STATUTE SHOULD COME FROM CONGRESS, NOT THE COURTS.

Because this Court has long recognized the distinction between entireties property and joint tenancies in the tax field and because every court of appeals that has addressed this issue in the context of a traditional entireties estate has said that § 6321 does not reach such property, it would be exceedingly awkward suddenly to extend the statute to this setting. To the extent a change should be made at this late date, it ought to come from the legislature, which is in a better position to clarify how this new construction of the law would operate in practice.

In 1954, when the House proposed an amendment to § 6321 specifying that it would apply to entireties property, one of the concerns raised by the proposal was its impact on existing titles. The President of the Florida Title Association wrote the Senate to explain some of the difficulties of the legislation for a State like his that then recognized (and still recognizes) the entireties estate. The principal point of the letter was not to lobby for or against the bill, but to say that the legislation needed far more explanation. "[T]he act does not provide," the letter noted, "to what extent the claim of lien would exist nor how it is to be enforced nor how it may be released, and we believe it would vitally affect the method of title evidencing in the State of Florida and would materially and adversely affect the marketability of many titles." Hearings Before the Comm. on Finance, H.R. 8300, 83d Cong., Part 4 (Apr. 22-23, 1954) (Apr. 10, 1954 letter of Robert V. Workman). "It is the writer's view," the letter continued, "that if the Federal Government intends to claim a lien under [these] circumstances, the law should specifically provide the extent of the lien, the manner of its enforcement, and the manner of obtaining a release," and as well "the act should provide a waiver of the lien as affecting a bona fide purchaser for value or mortgagee who takes a deed or

mortgage from both the husband and wife while that relationship continues to exist." *Id.*

Mr. Workman's point is relevant not just to whether the 1954 amendment should have been adopted, but also to whether such a significant judicial change in the law ought to occur in the first place. While some of his concerns have been addressed since 1954, others have not. And still other questions are prompted by the Government's interpretation. Consider: Would the Government take the lien subject to the nondelinquent spouse's survivorship right, in which case any interest in the property (along with the lien that attaches to it) terminates upon the death of the delinquent spouse? If that were the case, would it not compel the IRS to seek immediate foreclosure in every case like this one, for fear that the lien interest could at any time suddenly terminate?

In addition, how does one determine the value of a present interest in entireties property when that interest is not only undivided but indivisible? And if such a calculation is possible, why would it not be the case that the Crafts would have been subject to the same rule if, like countless Americans, they placed the deed to their house in just one person's name—say Sandy's—and yet Don had full use of the house throughout his life? Likewise, does the attachment of the federal lien immediately convert a tenancy by the entirety into a joint tenancy or a tenancy in common since the husband and wife no longer have an equal indivisible right in the property? And, if so, does that mean state and private creditors could then reach the property?

There are in short countless questions raised by the Government's interpretation. And the inscrutable answers to all of them counsel against starting down this precipitous path. Better to leave the matter with Congress, which to date has conspicuously refused to alter the seven appellate court decisions rejecting this interpretation over the last 135 years.

IV. THE GOVERNMENT'S CONTRARY ARGUMENTS ARE MISTAKEN.

The United States makes several contrary arguments, all unpersuasive.

A. The Sixth Circuit Fully Appreciated The Distinct Roles Of State And Federal Law In Applying The Lien Statute.

In attacking the Sixth Circuit's decision, the Government first contests (Br. 16) the way the lower court framed the issue. It claims that the court mistakenly concluded that a State's definition of "property" could trump the federal definition of property under § 6321. Yet the Sixth Circuit did no such thing in *Craft I* and made that abundantly clear in *Craft II*. In *Craft I*, the court at the outset described the two-step analysis just the way the Government does here: "'[O]nce it has been determined that state law creates sufficient interest in the [taxpayer] to satisfy the requirements of [the statute], state law is inoperative,' and the tax consequences thenceforth are dictated by federal law." Pet. App. 50a (quoting *National Bank of Commerce*, 472 U.S. at 722 (internal quotation omitted)). In *Craft II*, the court confirmed that "state law determines the rights a taxpayer has in property and federal law determines whether those rights constitute 'property' or 'rights to property'" under § 6321. Pet. App. 15a n.13 (citing *Drye*, 120 S. Ct. at 481). In applying this two-step process, the court concluded that "[b]ecause Michigan law does not recognize one spouse's separate interest in an entireties estate, a federal tax lien against one spouse cannot attach to property held by that spouse as an entireties estate." Pet. App. 55a.

Also unavailing is the Government's related criticism (Br. 18-21) that the Sixth Circuit determined that state-law property "exemptions" may trump the federal lien statute. Like every court of appeals to address the issue and like this Court's own distinction between joint tenancies and entireties

tenancies in *Rodgers*, the court of appeals made clear that no exemption was needed "'because neither spouse possessed an independent interest in the property'" in the first place that would allow the lien to attach. Pet. App. 16a (quoting *Rodgers*, 461 U.S. at 702-03 n.31). As the court acknowledged, "'state law is inoperative'" once "'the requirements'" of the lien statute have been met. Pet. App. 50a (quoting *National Bank of Commerce*, 472 U.S. at 722 (internal quotation omitted)). But since the Government never satisfied those threshold requirements of the lien statute, the existence of an exemption under state law was analytically and practically beside the point.

For like reasons, the Government errs (Br. 20-21) in pointing to exemptions from the federal levy statute as proof that the lien statute extends to tenancies by the entirety. The levy statute, it is true, permits an administrative levy of "property or rights to property . . . belonging to" the taxpayer. 26 U.S.C. § 6334(c). And that law, it is also true, contains a list of thirteen specific exemptions (*e.g.*, wearing apparel, tools of a trade), which do not extend to tenancy-by-the-entirety estates. But that should not surprise anyone. Why exempt a *sui generis* interest in property to which private and public liens traditionally have never attached? Unless the threshold requirements of the law apply, there is nothing to exempt.

Nor is it true (Br. 20-21) that *Drye* held differently. The absence of an exemption for a disclaimed inheritance was relevant to *Drye* once it became clear that the heir had obtained separate and independent control over the assets of the estate (thereby meeting the definition of "property . . . belonging to" the taxpayer) *before* he disclaimed his right to the assets. Otherwise, interests with even the most attenuated value would be covered by the lien and levy statutes simply because they do not appear on the list of exemptions. *Drye* itself made clear that this is not what it meant. 528 U.S. 60 n.7 ("Nor do we mean to suggest that an expectancy that has

pecuniary value and is transferable under state law would fall within § 6321 prior to the time it ripens into a present estate."). And *Bess* proves that this is not what the Court meant. There the Court determined that the tax lien does not cover life insurance proceeds even though this form of property does not appear on the list of levy exemptions in § 6334 and even though several comparable forms of property (*e.g.*,annuity and pension benefits, workmen's compensation, unemployment benefits) do appear on that list.

B. The Government's Criticism Of "Legal Fictions" Is Misplaced.

The Government's next attack amounts to a variation on the same theme. It claims (Br. 22-25) that the Sixth Circuit "erred in relying on the legal fiction . . . that property held in a tenancy by the entirety" is indivisible and is "owned by the marital unit, rather than by the individual spouses." But the source of this criticism cannot possibly go to the impropriety of state-law legal fictions in general. For without them the law would come to a halt. Not just States, but the National Government as well, relies on them in assuring the supremacy of federal law, *see Ex Parte Young*, 209 U.S. 123 (1908), in limiting the federal liability of well-meaning but fallible corporate executives, *see First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (corporate veil doctrine), and in presuming astonishingly but necessarily that those who violate the law know the law, *see McBoyle v. United States*, 283 U.S. 25, 27 (1931). These fictions seem like farce when compared to the modest assumption under Michigan law that husband and wife become one, which in contrast to these other fictions requires little suspension of reality and by some accounts none at all. There is still a place in our legal system, it would seem, for States to allow brutally-mundane and blissfully-sacred couples alike to perceive themselves as one, and to be perceived by the law as one—at least when it comes to the real property they own. Surely a legal system that found a way to "split the atom

of sovereignty," *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)), then found a way to put it back together again by making "one out of many," can tolerate a similar perspective on marriage that predates Magna Carta.

Ultimately, in challenging this marital fiction, the Government presumably means to attack it in part, not in whole. The rub, then, is not with the State's recognition of marital unity but with its standing in the way of the Government's tax-collection prerogatives. State-law legal fictions, the argument goes, may not preempt the coverage of an otherwise-applicable federal law, for the same reason that state-law tax exemptions may not. That is true, but the point is inapplicable here.

The Court's tax cases preserve a careful line between state laws that preclude a property right from existing in the first instance and state laws that purport to disclaim or exempt that interest after the fact. The former are permissible; the latter are not. That the Government has pressed its "legal fiction" claim one case too far becomes clear when reconsidering the facts of *Irvine* and *Drye*. In *United States v. Irvine* the Court held that a state law allowing an individual to disclaim a gift would not force the Court to be "struck blind" to the fact that the transfer had already occurred and that federal law covered it before the disclaimer. 511 U.S. 224, 239-40 (1994). And *Drye* held that a state-law disclaimer could not retroactively undo a vested right in an estate that the taxpayer already held. Merely to recite the facts of these cases is to explain why they do not apply here. Michigan's view of entireties estates does not disclaim independent vested rights in property; it precludes them from coming into being in the first instance. *Long*, 277 Mich. at 517; *Nurmi*, 275 Mich. at 330; *Sanford*, 204 Mich. at 248-19.

C. The Government's Other Arguments Are Wrong.

Once the critiques of (1) the Sixth Circuit's formulation of the issue and (2) its treatment of Michigan "legal fictions" are put to rest, the answers to the Government's additional arguments fall into place. Far from ignoring the language of the statute (Br. 12-15), Sandy Craft's position fully respects it. Whether one considers the present interests of a spouse (*e.g.*, to use the property) or the future interest (*e.g.*, the right of survivorship), the problem is the same: Neither interest is divisible, neither interest "belongs to" the individual and neither interest accordingly may be attached as a cognizable separate and determinable right to property. For better or worse, a spousal interest in property anchored to the continuation of a marriage and to the unique, non-transferable status of being a spouse to that union does not lend itself to a lien applicable to "property or rights to property . . . belonging to" the taxpayer.

The Government's effort to shore up this argument (Br. 14-15) by invoking Takings and Due Process Clause decisions falls flat. It seems exceedingly unlikely that the Government means to concede, as opposed faintheartedly to hint, that both Clauses reach all "property" covered by the lien statute. But, at any rate, the proposition causes more problems for the Government than it solves. In the first place, it would mean that innocent spouses would have Takings claims against the United States whenever the lien statute diminished their interests in the property or destroyed their right to survivorship. *See Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2463 (2001). In the second place, the existence of this alleged constitutional issue only confirms why the lien statute should be construed *not* to apply to traditional tenancies by the entirety. *See Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001); *Jones v. United States*, 529 U.S. 848, 857 (2000).

Also misplaced is the Government's footnoted reliance (Br. 25 n.14) on commentators. The primary author cited agrees that "[i]t has long been the rule that the federal tax lien does not attach to tenancy-by-the-entireties interests." Steve R. Johnson, *After Drye: The Likely Attachment of the Federal Tax Lien to Tenancy-By-The-Entireties Interests*, 75 Ind. L.J. 1163, 1163 (Fall 2000); Steve R. Johnson, *Fog, Fairness and the Federal Fisc: Tenancy-by-the-Entireties Interests and the Federal Tax Lien*, 60 Mo. L. Rev. 839, 844 (Fall 1995) ("in the sixteen full bar states, the tax lien does not attach at all to entireties property and entireties interests"). And to the extent Professor Johnson disagrees with this policy, he acknowledges that "legislation holds more promise as the means by which to finally abolish the bar." 60 Mo. L. Rev. at 841. Nor, at any rate, has the Government accounted for myriad other experts, including most notably the drafter of the 1966 Federal Tax Lien Act, who agrees that "the interests of tenants by the entirety, which are confined to the husband-wife relationship, represent the one well-established sanctuary beyond the reach of the government's tax lien." William T. Plumb, Jr. & L. Hart Wright, *Federal Tax Liens*, 35 (ALI and ABA Jt. Comm. on Continuing Legal Educ. 1961); *see also id.*at 35-36 (2d ed. 1967) (same); *id.* at 37-38 (3d ed. 1972) (same).

The Government further suggests (Br. 28-29) that the lower-court record is more equivocal than the majority and dissent indicated in *Rodgers*. As noted above, the D.C., Third, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits all provide that the tax lien statute does not reach entireties property in those States where the tenancy is recognized and where neither spouse has a divisible interest in the property. In the face of this record, the Government suggests (Br. 28) that other federal courts have applied the federal tax lien differently. The cited cases, however, simply deal with States that, in the aftermath of the Married Women's Property Acts, took different paths in modifying their tenancy-by-the-entirety

laws. Indeed, in seeking review in this case, the Government did not argue at the certiorari stage that the Sixth Circuit's interpretation of the tax-lien statute conflicted with *any* lower-court decisions. That many States have not followed Michigan's example, instead defining the tenancy differently or abandoning it altogether, does not change matters. The federal tax lien takes the States' definitions of interests in property as it finds them. This familiar rule has been applied in a wide range of settings, and no good reason has been offered for abandoning it here. *Cf., e.g., Burks v. Lasker*, 441 U.S. 471, 478 (1979) (authority of independent corporate directors); *Agency Holding Co. v. Malley-Duff & Assoc.*, 483 U.S. 143, 147 (1987) (limitations periods); *Atherton v. Fed. Deposit Ins. Corp.*, 519 U.S. 213, 220 (1997) (banking law).

In seizing on these different state-law definitions as proof that Sandy Craft's position will "create irrationally disparate treatment of similarly situated taxpayers" (Br. 25), the Government does not overcome this flaw. Again, a federal law that does not itself create property rights, but relies on 50 different state laws to create those property interests, will of course lead to differential treatment of taxpayers who choose to live in different States. Nor does the Government's use of constitutionally-evocative language change matters. The United States has never attacked Michigan's law on equal protection grounds; it cannot do so here. And, at any rate, the joint tenancy and the tenancy by the entirety are different. They reflect not only a difference in definition but a difference in kind.

At the same time that it says fewer and fewer States still recognize the tenancy by the entirety, the Government argues (Br. 30-32) that the Michigan law will lead to rampant tax evasion and obstruction. Not so. For one, the 135-year reign of the current understanding of the federal tax lien has caused no such problems. Indeed, the IRS manuals contain several suggestions on how to avoid the possibility. *See, e.g.*, IRM § 5.17.14.3.8 (suggesting that transferee liability principles,

including fraudulent conveyance laws, should be used to reach property transferred to a tenancy by the entirety). *See also* IRM § 5.6.1.2.3(4) (discussed in General Litigation Bulletin 200140081) (Oct. 5, 2001) (suggesting that a consensual lien can be used as a means of securing the government's right to "collect property the federal tax lien does not attach to, such as real property held as a tenancy by the entirety"). For another, a legislature fearful of inter-spousal tax evasion would not have created an unlimited marital deduction from the gift tax and would not have said that entireties property is specifically excluded from the Fair Debt Collection Act, 26 U.S.C. § 2523(a); 28 U.S.C. §§ 3301, 3010(a).

For still another reason, taxpayers like Sandy Craft must take the bitter with the sweet. Just as state law gave the Crafts a property interest that was not attachable, it also supplied the Government with a fraudulent conveyance theory that ultimately led to the return of over $6,000 to the Government and could have led to the return of the remaining $50,000. *McCaslin v. Schouten*, 294 Mich. 180 (1940) (under Michigan law, spouse cannot hide funds by investing in unattachable property). *See also* Pet. App. 27a-32a, 81a-85a, 86a. That was exactly the purpose of *Craft II*—to let the United States prove on remand (to the extent it could) that Don Craft had acted inappropriately. And that is exactly the argument the Government is making in another Michigan case. *See* Br. 31 (citing *Hatchett v. IRS*, 126 F. Supp. 2d 1038 (E.D. Mich. 2000), appeal docketed, No. 00-1645 (6th Cir. June 13, 2000)). In the end, the Government has ample means at its disposal to ensure that those with guile and those without do not evade their tax obligations.

All of this is not to say that Congress lacks the power to preempt a state-law fiction that to date has barred cognizable rights to property from coming into existence. That is just what happened in *Tyler v. United States*, 281 U.S. 497 (1930). At stake in *Tyler* was the constitutionality (under the Fifth, Fourteenth and Sixteenth Amendments) of a portion of the

estate tax. In conspicuous contrast to the lien statute, Congress in 1916 specifically extended the estate tax to tenancies by the entirety. As the Court noted, that legislation had the effect of assessing the realities of marital property differently from the way Maryland and Pennsylvania had assessed them. Thus, despite the "amiable fiction" under the laws of those States that two become one after marriage, the Court held that the "power of taxation" of the United States "is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions," and that the federal "lawmaker . . . is free to ignore them and adopt his own." *Id.* at 502-03. Congress could have done the same thing here. But it did not, proving that the real fiction here is the claim that improper State action, as opposed to Federal inaction, is to blame for the invalidity of this lien.

CONCLUSION

The Sixth Circuit's decision should be affirmed.

Respectfully submitted,

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December 2001

APPENDIX A
HISTORY OF FEDERAL TAX LIEN STATUTE

Year	Cite	Text
1865	Act of Mar. 3, 1865, ch. 78 13 Stat. 469, 470-71	"And if any person, bank association, company, or corporation, liable to pay any duty, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with the interests penalties, and costs that may accrue in addition thereto, upon all property and rights to property;...."
1866	An Act to reduce Internal Taxation..., ch. 184 14 Stat. 98, 107	"And if any person, bank, association, company, or corporation, liable to pay any tax, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person, bank, association, company or corporation."

Year	Cite	Text
1879	An Act to amend the laws relating to internal revenue, ch. 125 20 Stat. 327, 330	"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment-list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person."
1913	An Act to Amend Section 3186 of the Revised Statutes of the United States, ch. 166 37 Stat. 1016	"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with interest, penalties, and costs that may accrue in addition thereto upon all property belonging to such person...."

Year	Cite	Text
1925	Act to Amend Section 3186 of the Revised Statutes, ch. 344 43 Stat. 994	"That if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto upon all property and rights to property belonging to such person..."
1928	An Act to reduce and equalize taxation, provide revenue, and for other purposes, ch. 852 45 Stat. 791, 875	"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time."

Year	Cite	Text
1939	Internal Revenue Code of 1939, ch. 36 53 Stat. 444, 448	"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."
1954	Internal Revenue Code of 1954, ch. 64 68a Stat. 775, 779 26 U.S.C. § 6321	"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

APPENDIX B

STATES RECOGNIZING TRADITIONAL TENANCY BY THE ENTIRETY

STATE OR OTHER JURISDICTION	AUTHORITY FOR TENANCY BY THE ENTIRETY	JUDICIAL REJECTION OF THE FEDERAL TAX LIEN
Delaware	Del. Code Ann., tit. 25, § 309; tit. 12, § 703; *Citizens Sav. Bank v. Astrin*, 44 Del. 451, 455 (Del. Super. Ct. 1948)	*Internal Revenue Service v. Gaster*, 42 F.3d 787, 791 (3d Cir. 1994)
District of Columbia	*Alpher v. Preston (Estate of Wall)*, 440 F.2d 215, 219 (D.C. Cir. 1971)	*Benson v. United States*, 442 F.2d 1221, 1225 (D.C. Cir. 1971)
Florida	Fla. Stat. Ann. §§ 689.11; 708.10; *Hunt v. Covington*, 145 Fla. 706, 708 (1941)	*United States v. American National Bank of Jacksonville*, 255 F.2d 504, 507 (5th Cir.), *cert. denied*, 358 U.S. 835 (1958)

STATE OR OTHER JURISDICTION	AUTHORITY FOR TENANCY BY THE ENTIRETY	JUDICIAL REJECTION OF THE FEDERAL TAX LIEN
Hawaii	Haw. Rev. Stat. § 509-1; § 509-2; *Sawada v. Endo*, 57 Haw. 608, 615-16 (1977)	*Theo. H. Davies & Co., Ltd. v. Long & Melone Escrow, Ltd.*, 876 F. Supp. 230, 233-34 (D. Haw. 1995)
Illinois	Ill. St. Ch. 735 § 5/12-112; *Premier Property Mgmt. v. Chavez*, 191 Ill. 2d 101, 109 (2000)	*United States v. Davenport*, 106 F.3d 1333, 1336-37 (7th Cir. 1997)
Indiana	Ind. Code § 32-4-2-1; *Myler v. Myler*, 137 Ind. App. 605, 609 (1965)	*United States v. Davenport*, 106 F.3d 1333, 1336-37 (7th Cir. 1997) (Illinois law)
Maryland	Md. Real Prop. Code Ann. § 4-108; *Watterson v. Edgerly*, 40 Md. App. 230, 236-37 (1978)	*Pitts v. United States*, 946 F.2d 1569, 1571-72 (4th Cir. 1991) (Virginia law involving levy)

STATE OR OTHER JURISDICTION	AUTHORITY FOR TENANCY BY THE ENTIRETY	JUDICIAL REJECTION OF THE FEDERAL TAX LIEN
Michigan	M.C.L. Ann. § 557.81; *DeYoung v. Mesler*, 373 Mich. 499, 503-04 (Mich. 1964)	*Cole v. Cardoza*, 441 F.2d 1337, 1343 (6th Cir. 1971)
Missouri	Mo. Ann. Stat. § 442.025; *Hanebrink v. Tower Grove Bank & Trust Co.*, 321 S.W.2d 524 (Mo. Ct. App. 1959)	*United States v. Hutcherson*, 188 F.2d 326, 330 (8th Cir. 1951)
North Carolina	N.C. Gen. Stat. §§ 39-13.3 to 39-13.6; *L & M Gas Co. v. Leggett*, 273 N.C. 547, 550 (1968)	*Pitts v. United States*, 946 F.2d 1569, 1571-72 (4th Cir. 1991) (Virginia law involving levy)

STATE OR OTHER JURISDICTION	AUTHORITY FOR TENANCY BY THE ENTIRETY	JUDICIAL REJECTION OF THE FEDERAL TAX LIEN
Ohio	*Central Nat. Bank of Cleveland v. Fitzwilliam*, 12 Ohio St.3d 51, 53 (1985), *superseded by* Ohio Rev. Code §§ 5302.17, 5302.21	*Cole v. Cardoza*, 441 F.2d 1337, 1343 (6th Cir. 1971) (Michigan law)
Pennsylvania	Pa. Stat. Ann., tit. 69, § 541; *Stauffer v. Stauffer*, 465 Pa. 558, 576 (1976)	*Raffaele v. Granger*, 196 F.2d 620, 622 (3d Cir. 1952)
Vermont	Vt. Stat. Ann. tit. 27 § 2; *Cooper v. Cooper*, 783 A.2d 430, 445 (Vt. 2001)	
U.S. Virgin Islands	*Masonry Prods., Inc. v. Tees*, 280 F. Supp. 654, 656 (D.V.I. 1968)	*Raffaele v. Granger*, 196 F.2d 620, 622 (3d Cir. 1952)

STATE OR OTHER JURISDICTION	AUTHORITY FOR TENANCY BY THE ENTIRETY	JUDICIAL REJECTION OF THE FEDERAL TAX LIEN
Virginia	*Rogers v. Rogers*, 257 Va. 323, 326 512 S.E.2d 821, 822 (1999); *Vasilion v. Vasilion*, 192 Va. 735, 742-43 (1951)	*Pitts v. United States*, 946 F.2d 1569, 1571-72 (4th Cir. 1991) (involving levy); *Moore v. Glotzbach*, 188 F. Supp. 267, 268 (E.D. Va. 1960)
Wyoming	Wyo. Stat. Ann. § 34-1-140; *Ward Terry and Co. v. Hensen*, 75 Wyo. 444, 461-62 (1956)	*Talbot v. United States*, 850 F. Supp. 969, 975 (D. Wyo. 1994)